

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2022-175**

LISA HUNDLEY

APPELLANT

**FINAL ORDER
SUSTAINING HEARING OFFICER'S
FINDINGS OF FACT, CONCLUSIONS OF LAW
AND RECOMMENDED ORDER**

VS.

ENERGY AND ENVIRONMENT CABINET

and

PERSONNEL CABINET

APPELLEES

*** **

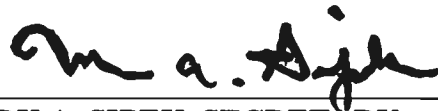
The Board, at its regular September 2023 meeting, having considered the record, including the Findings of Fact, Conclusions of Law, and Recommended Order of the Hearing Officer dated August 16, 2023, and being duly advised,

IT IS HEREBY ORDERED that the Findings of Fact, Conclusions of Law, and Recommended Order of the Hearing Officer are approved, adopted, and incorporated herein by reference as a part of this Order, and the Appellant's appeal is therefore **DISMISSED**.

The parties shall take notice that this Order may be appealed to the Franklin Circuit Court in accordance with KRS 13B.140 and KRS 18A.100.

SO ORDERED this 17th day of September, 2023.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Lisa Hundley
Hon. Jessica Robles
Hon. Zach Mowen
Hon. Rosemary Holbrook (Personnel Cabinet)

**COMMONWEALTH OF KENTUCKY
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 AND RECOMMENDED ORDER**

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A pre-hearing conference was conducted on May 15, 2023, at 10:30 a.m., ET, at 1025 Capital Center Drive, Suite 105, Frankfort, Kentucky, before the Hon. Mark A. Sipek, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Lisa Hundley, was present by telephone and was not represented by legal counsel. The Appellee Energy and Environment Cabinet was present by telephone and represented by the Hon. Jessica Robles. The Appellee Personnel Cabinet was present by telephone and represented by the Hon. Zachary Mowen.

The purposes of the pre-hearing conference were to determine the relief sought by the Appellant, to define the issues, to address the Appellant's Motion to Amend, and to address any other matters relating to the appeal. On March 30, 2023, the Appellant and the Energy and Environment Cabinet were unsuccessful in mediating this matter. Thereafter, the Appellant filed a Motion to Amend the instant appeal to join the Personnel Cabinet as a party. The Appellant's Motion to Amend was granted. Thereafter, the Appellees were granted leave to file a Motion for Summary Judgment.

At issue in this appeal is a claim that the Appellant was penalized through the alteration of the Appellees' telecommuting policy. Due to COVID-19, at one point, most Executive Branch employees were permitted to work from home as an "alternative workstation." In October 2022, the Appellees' policies on telecommuting were altered in response to changing conditions. As a result of one of those alterations, the Appellant's telecommuting privileges were revoked following a change in the Energy and Environment Cabinet's Telecommuting Policy, which was based on the Personnel Cabinet's Executive Branch Telecommuting Policy. Pertinent to this appeal, the policies do not permit employees to telecommute from an alternate workstation outside of the

Commonwealth of Kentucky. Here, the Appellant's telecommuting privileges were revoked because she identified her alternate workstation as her home address in New Tazewell, Tennessee. The Appellant has alleged that the revocation of her telecommuting privileges was a penalization as defined by KRS Chapter 18A, and that the revocation was discriminatory based on her sex, age, and residence.

The Appellees sought leave to file a dispositive motion on these matters and a briefing schedule was set. All parties were encouraged to attach any relevant documents to their filings. The Appellees were given until June 16, 2023, to file a dispositive motion; the Appellant was given until July 17, 2023, to file a response to the Appellees' dispositive motion; and the Appellees were given until August 1, 2023, to file replies to the Appellant's response, if any, to the Appellees' dispositive motion.

The Appellees filed a Motion for Summary Judgment on May 30, 2023. The Appellant did not file a response to the Appellees' Motion for Summary Judgment. Accordingly, this matter stands submitted to the Hearing Officer.

BACKGROUND

1. The Appellant is an employee of the Energy and Environment Cabinet. Her primary workstation is located in Middlesboro, Kentucky, and her home address is in New Tazewell, Tennessee, approximately forty (40) minutes from Middlesboro by car.
2. When the COVID-19 pandemic began, the Appellant, like most other Executive Branch employees, was permitted to telecommute from her home address. In October 2022, however, the Appellant was notified that her telecommuting privileges were revoked, solely due to the alternate workstation identified on her Telecommuting Agreement being located in Tennessee.
3. Both the Energy and Environment Cabinet's Telecommuting Policy and the Personnel Cabinet's Executive Branch Telecommuting Policy allow employees to telecommute from an alternate workstation at the Agency's discretion. However, the policies mandate that employees are required to identify an alternate workstation located within the Commonwealth of Kentucky in order to be eligible. The Appellant's residence is not located in Kentucky and, therefore, is not an authorized alternate workstation.
4. The Appellant filed an appeal with the Personnel Board on December 16, 2022, alleging that the termination of her telecommuting privileges was a penalization and was also discriminatory. She alleged discrimination based on sex, age, and residence. She attached her grievance to her appeal form. This grievance sets out the Appellant's discrimination claims and reads as follows:

On October 14th I was informed that I would no longer be allowed to work a hybrid telecommute schedule because I live in the state of Tennessee. As

a merit employee of the Commonwealth of Kentucky, I feel that this is discrimination. I am not being given the same privileges and opportunities as my fellow merit employees. I thought that was what the merit system's purpose is to protect employee's and to ensure equal benefits, privileges, and opportunities. Ensuring that no certain group is singled out and treated differently than another. I am being harassed and discriminated against in my region because I am a female over the age of 40 and my residency. There are males in my office and across the region that are still being given the opportunity to continue to telecommute a hybrid schedule. There are male employees who have to travel out of state for trainings and meetings. They are also required to travel across state lines to inspect job sites. This is no different, they are working out of state. The male employees are also required to be accessible by phone after work hours in instances of emergencies if they are out of state and answer that phone, they are, at that time, on the clock out of state. If the job assignments are being completed, why is work location an issue now? It seems like the office jobs that are mainly made up of females are the issue. Are any of the employees across the state, especially the ones working in Frankfort offices also having their telecommuting privileges terminated? Most office jobs are made up of middle-aged women and I feel that this is a tactic and the first step for the Commonwealth to get women back in the office and "hold down the fort" so to speak. They want women in the office to greet the public and answer the phones. The office is thought of as a woman's workstation. Is it that the state is trying to get rid of me because I am getting older so they can replace me with a younger fresher employee? So, I am being the first to be made an example of? During the pandemic, everyone was required to work from home. Your residence, gender, or age was not a factor for telecommuting. This was not even an issue the year after the pandemic and then when we were called back into the offices, there was no issues with anyone telecommuting on a hybrid schedule. So why all of a sudden is this an issue? The telecommute policy states, "an alternate workstation shall not include a permanent workstation outside the Commonwealth". I signed a telecommuting contract when we were required to return to work and my contract did not state anything about a permanent telecommuting schedule. My contract is for a hybrid work schedule that can be taken away at any time because it is a privilege. My contract also states that I must be at a workstation that is at least 3 hours within reach of your home assigned office in case you are called into the office unexpectedly. This does not specify in any way that it has to be in the state of Kentucky. I meet all the criteria. Again, what is the purpose of singling me out by terminating my telecommute privileges when I am an Ace award winning and an Outstanding Performance award winning merit employee who has no reason to be punished. I feel it is obvious that I am being singled out by using residency as an excuse, to inadvertently start their process of getting

women back in the offices where "they belong". This is completely discrimination against my gender, age, and residency. I am appalled of the actions of Human Resources. I thought their employees were thought of in a higher regard than this. It has also become obvious to me, that the merit system provides no protection for its employees.

5. In support of its Motion for Summary Judgment, the Appellees attached the Affidavit of Mary Elizabeth Bailey, the Secretary of the Kentucky Personnel Cabinet. Secretary Bailey formerly served as Commissioner of the Department of Human Resources within the Personnel Cabinet from July 2012 through December 2022. Secretary Bailey stated that, during the COVID-19 pandemic and with increased use of telecommuting throughout state government, agencies were advised that allowing employees to work remotely from outside of the Commonwealth of Kentucky could create liability risks for the employer. [Secretary Bailey Affidavit ¶¶ 1-3]

6. Telecommuting outside of the Commonwealth places an undue burden on agencies and their Offices of Legal Services by requiring each of those offices to enter into memorandums of understanding with the Personnel Cabinet for research on all relevant employment issues that would be required for every state, county, and locality for every employee regularly telecommuting across state lines. These employment issues include, but are not limited to, unemployment insurance, short-term disability, worker's compensation, paid time off policies, tax rates, tax forms, state minimum wage, laws governing meals and breaks, and overtime calculations. This research would require ongoing maintenance and updates as laws change by location. Thus, as a general policy, employees are not permitted to telecommute from an alternate workstation outside of the Commonwealth. [Secretary Bailey Affidavit ¶¶3-5]

7. The Appellant has also alleged that the denial of her telecommuting privileges is discrimination based on her sex, age, and residence. However, the Appellant has failed to name a single similarly situated employee, in all respects, who is permitted to telecommute from an alternate workstation located outside of the Commonwealth of Kentucky.

FINDINGS OF FACT

1. There are no genuine issues of material fact. This appeal can be decided based on the appeal form and the attachments, and the Appellees' Motion for Summary Judgment with attachments, including the Affidavit of Secretary Bailey.

2. The Appellant, Lisa Hundley, was previously permitted to telecommute from an alternate workstation in her residence in Tennessee. The Appellant's telecommuting privileges were revoked after a change in the Energy and Environment Cabinet's Telecommuting Policy prohibited alternate workstations outside of the Commonwealth. The change in policy was based on thorough research into the legal issues created by allowing state employees to telecommute from other states.

3. It is clear that the revocation of the Appellant's telecommuting privileges did not result from a disciplinary action. The Appellant was not involuntarily transferred, had not received a negative salary adjustment, nor any other action that increased, diminished, or changed her level, rank, discretion, or responsibility, including a reclassification or reallocation to a lower grade or rate of pay.

4. Similarly, the Appellant has failed to set forth any statute or regulation that would entitle her to telecommute absent agency approval.

5. The Appellant alleges that she was discriminated against based on her sex, age, and residence. During the pre-hearing conference on May 15, 2023, the Appellant failed to name any other similarly situated state employees in all respects who were being treated more favorably and were allowed to telecommute from outside of the Commonwealth of Kentucky. The Appellant has failed to allege any facts that would create an issue that the Appellees' Executive Branch Telecommuting Policy has been applied in a discriminatory manner based on sex or age. In fact, the Appellant has compared herself to younger male employees who have job duties that sometimes take them out of state for training, meetings, and to inspect job sites. This is dissimilar to the Appellant situation. She is appealing the fact that she is no longer able to perform her regular work duties two (2) days per week from her home that is located in Tennessee.

6. After careful consideration, the Hearing Officer finds that the Appellant has failed to state a claim on which she could prevail. The Appellant has failed to establish that she suffered a penalization. Furthermore, the Appellant has failed to establish a *prima facie* case of discrimination because she has failed to identify any other state employee similarity situated to her in all respects who was permitted to telecommute from outside of the Commonwealth of Kentucky.

CONCLUSIONS OF LAW

1. The Appellant has failed to allege a penalization as that term is defined at KRS 18A.005(24). The definition reads as follows:

“Penalization” means demotion, dismissal, suspension, fines, and other disciplinary actions; involuntary transfers; salary adjustments; any action that increases or diminishes the level, rank, discretion, or responsibility of an employee without proper cause or authority, including a reclassification or reallocation to a lower grade or rate of pay; and the abridgment or denial of other rights granted to state employees;

2. 101 KAR 2:095, Section 6(3), which authorizes and governs the telecommuting policy, states, “[e]ligibility and selection for participation in a telecommuting program shall be the decision of the agency, with no implied or specific right to participation being granted to an employee.” The General Assembly has indicated in KRS 13A.090(1) that promulgated regulations

are presumed to be valid. *See Lowe v. Environmental Protection Cabinet*, 1991 WL 11688292 at *7 (KY PB 1991-157). *See also* KRS 13A.090(1).

3. The fact that the Appellant was able to telecommute during the COVID-19 pandemic does not give her a continuing right to telecommute. The regulation that authorizes the policy, and the policy itself, make clear that the decision to allow or deny telecommuting is a decision within the Agency's discretion. The denial of telecommuting privileges previously granted to an employee does not constitute a penalization. *Stephen Mason v. Justice and Public Safety Cabinet, Department of Corrections and Personnel Cabinet* (KY PB 2022-121).

4. Further, the burden is on the Appellant to establish a *prima facie* case of discrimination. "When the plaintiff lacks direct evidence of discrimination, 'the plaintiff must show that the 'comparables' are similarly situated in all respects.'" *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 352 (6th Cir. 1998). An appellant must present evidence that all relevant aspects of his employment situation are "nearly identical to those of the employees who [s]he alleges were treated more favorably." *Board of Regents of Northern Kentucky University v. Weickgenannt*, 485 S.W.3d 299, 308 (Ky. 2016). Here, the Appellant has compared herself to younger male employees who are dissimilar in many respects.

5. The Hearing Officer specifically finds that the Personnel Board does not have jurisdiction over a claim of discrimination based on being a resident of a state other than Kentucky. *Mason*, (KY PB 2022-121).

6. Further, the Appellant has failed to allege any facts that would create an issue that the Appellee's Telecommuting Policy has been applied in a discriminatory manner based on age or sex. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991) holds that any doubts in a motion for summary judgment must be resolved in favor of the non-moving party. *Steelvest, Inc.*, also states that, in order for a summary judgment motion to succeed, there must be no genuine issue of material fact. In ruling on a motion for summary judgment, the Hearing Officer's role is not to decide issues of fact but is to determine whether or not any questions of fact remain outstanding. In this case, the Appellant has failed to state any facts or issues regarding penalization or discrimination. Thus, the Appellees have met the strict standard for entitlement to Summary Judgment at this early stage of the proceeding.

7. There are no genuine issues of material fact underlying this appeal and this appeal can be decided as a matter of law based on the appeal form, including the attachments, the statements of the parties at the pre-hearing conference, and the Appellees' Motion for Summary Judgment, including attachments. KRS 13B.090(2) and KRS 18A.095(18)(a).

8. Because all the events underlying this Appeal occurred before the effective date of Senate Bill 153, all references to KRS Chapter 18A are to the sections in effect at the time of the events associated with this Appeal.

RECOMMENDED ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, the Hearing Officer recommends to the Kentucky Personnel Board that the appeal of **LISA HUNDLEY V. ENERGY AND ENVIRONMENT CABINET AND PERSONNEL CABINET (APPEAL NO. 2022-175)** be **DISMISSED**.

NOTICE OF EXCEPTION AND APPEAL RIGHTS

Pursuant to KRS 13B.110(4), each party shall have fifteen (15) days from the date this Recommended Order is mailed within which to file exceptions to the Recommended Order with the Personnel Board. In addition, the Kentucky Personnel Board allows each party to file a response to any exceptions that are filed by the other party within fifteen (15) days of the date on which the exceptions are filed with the Kentucky Personnel Board. 101 KAR 1:365, Section 8(1). Failure to file exceptions will result in preclusion of judicial review of those issues not specifically excepted to. On appeal, a circuit court will consider only the issues a party raised in written exceptions. See *Rapier v. Philpot*, 130 S.W.3d 560 (Ky. 2004).

[Hearing Officer Note: Any document filed with the Personnel Board shall also be served on the opposing party.]

The Personnel Board also provides that each party shall have fifteen (15) days from the date this Recommended Order is mailed within which to file a Request for Oral Argument with the Personnel Board. 101 KAR 1:365, Section 8(2).

Each party has thirty (30) days after the date the Personnel Board issues a Final Order in which to appeal to the Franklin Circuit Court pursuant to KRS 13B.140 and KRS 18A.100.

SO ORDERED at the direction of the Hearing Officer this 16 day of August, 2023.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day emailed and mailed to:

Lisa Hundley
Hon. Jessica Robles
Hon. Zachary Mowen
Hon. Rosemary Holbrook (Personnel Cabinet)